The decision of the learned judge was clearly not a specific finding of fact but a finding of facts which are really inferences drawn from facts specifically found, and on the principles enunciated in *Benmax* v. *Austin Motor Co. Ltd.*,[1] we feel more at liberty to form an independent opinion on the conclusion which should reasonably be drawn.

Making allowances for the well-known fact that it is difficult to judge distances from photographs alone, we agree that there seems to be appreciable difference between the relative positions of the vehicles in the photographs produced by the police and those produced by the part-time reporter.

Let us next consider the testimony of Sgt. Yusof PW2. His evidence that he had arrived at the scene at about 9.30 a.m., and had taken the relevant photographs before the vehicles were moved went unchallenged. Moreover he said that he remained at the scene until both vehicles had been towed away.

No questions were put to this witness then or later, after the defence had produced their photographs, as to why the onlookers did not appear in the photographs he produced. It is not difficult to surmise that the police were in a position to ask onlookers to move aside so as to obtain the clearest photographs possible.

It appears from Lim's own testimony that in all probability he had taken his photographs after the police had taken theirs. It seems to us that the probabilities are that Lim's photos were therefore taken after the vehicles had been moved prior to their being towed away.

The learned trial judge, regrettably did not say why he thought PW2 a police sergeant should perjure himself, particularly in an action in which he has no personal interest. The fact remains that whichever set of photographs is favoured does not obviate the fact that the two vehicles had collided roughly in the centre portion of a rather narrow road.

We are of the view that the principles enunciated in *Baker* v. *Market Harborough Industrial Cooperative Society Ltd.*,[2] followed by our Court of Appeal in *Ong Yam Chong & Anor.* v. *Chan Wah*[3] that where there is a collision between two vehicles travelling in opposite directions then in the absence of special circumstances there is a *prima facie* presumption that both drivers are negligent and the onus falls on each of them to show that the other driver rather than himself was negligent, is applicable in this instance.

The learned judge, unable to resolve his doubts had drawn inferences which do not appear to us, with respect, to be tenable, and accordingly we are of the view that the proper course is to hold that each driver was 50% to blame.

On counsel for the parties being so informed the parties came to an agreement as regards damages as follows:

Special damages	$1,318
General damages	$14,000.

The appeal was accordingly allowed, the damages to be as agreed, appellant awarded half the costs both in the court below and in this court and appellant's deposit was refunded.

Appeal allowed.

Solicitors: *Murphy & Dunbar; Vohrah & Tan Chee Lan.*

ARUMUGAM PILLAI v. GOVERNMENT OF MALAYSIA

[F.C. (Lee Hun Hoe C.J. (Borneo), Chang Min Tat & Salleh Abas F.JJ.) August 5, 6 & September 4, 1980]

[Kuala Lumpur — Federal Court Civil Appeal No. 185 of 1978]

Revenue Law — Income Tax — Incorrect return or information by tax payer — Imposition of penalty — Recoverable as tax — Default in payment of tax — 10% Increase on amount or balance of tax — Application for declaration that imposition of penalties should not have been made pending appeal to Privy Council — Declaration that levy of 10% increase for late payment was ultra vires and void — Declaration that revenue not entitled to claim penalty in respect of year 1972 — Application to strike out statement of claim on grounds that it disclosed no reasonable cause of action and was frivolous and vexatious and an abuse of process of court — Application granted by Judge after summons adjourned to court — Whether appeal lies — Clear provisions in legislation — Penalties and increases validly imposed and recoverable before appeal to Privy Council disposed of — Application for declarations struck out — Deduction for Singapore losses — Income Tax Ordinance, 1947, ss. 82, 91(1) — Income Tax Act, 1967, ss. 103(4), 113(2) — R.S.C., 1957, O. 25 r. 4 and O. 54, rr. 22 and 22A — Courts of Judicature Act, 1964, s. 68(2) — Federal Constitution, art. 96.

Practice and Procedure — Application by summons in chambers to strike out statement of claim — Summons adjourned to open Court — Application granted by Judge — Whether appeal lies without application for further argument or certificate that no further argument required — R.S.C., 1957, O. 54 rr. 22 and 22A.

In this case as a result of back-duty investigation notices of additional assessment of tax were served on the appellant. From these assessments, the appellant appealed to the Special Commissioners who made further increases ([1956] 4 M.L.J. 95). The appeal by way of case stated to the High Court was dismissed ([1977] 1 M.L.J. 67) and so was the appeal to the Federal Court ([1977] 2 M.L.J. 63). An appeal to the Yang di-Pertuan Agong was awaiting the advice of the Privy Council. In exercise of powers under the Income Tax Ordinance and The Income Tax Act, the Director-General of Income Tax imposed penalties and levied the increases for the years 1953, 1957-1962, 1966-1972. Notices of the additional demands were issued on January 24, 1976.

The appellant sought declarations that the imposition of the penalties should not be made since there was pending an appeal to the Privy Council and the matter was *sub judice* and further that it was *ultra vires* and void. He also sought other declarations that the levy of a 10% increase for late payment was *ultra vires* and void. A further declaration was sought that Revenue was not entitled to claim the penalty in respect of the year 1972.

The respondent thereupon applied by a summons in chambers to strike out the statement of claim and to have the action dismissed on the grounds that it disclosed no reasonable cause of action, it was frivolous and vexatious and an abuse of the process of the courts. The summons was adjourned into court for hearing and the learned judge made the order sought for in the summons. The appellant thereupon appealed to the Federal Court.

Held: (1) the "any order" referred to in rule 22A of the Rules of the Supreme Court must on a proper construction and in the absence of any words of limitation mean and include a final order so that if it is made in chambers or by

the deeming provisions of rule 22, no appeal lies without an application for further argument or without the judge's certificate;

(2) in any event, however final an order may be that is made in Chambers it cannot be final until and unless one or other of the steps required in rule 22A has been taken. Until then, it remains in effect and for all practical purposes an interlocutary order and therefore caught by section 68(2) of the Courts of Judicature Act, 1964. No appeal therefore lies from such an order;

(3) in this case leave would be granted for the appeal to be brought to enable the appeal to be heard;

(4) although the court has jurisdiction to grant a declaration, the relief claimed in the action was in substance for the modification, if not the cancellation of the assessment made under the Ordinance and the Act. The question was whether the application of the provisions for tax penalties and the increases in certain circumstances and at rates set by statute was challengeable by declarations;

(5) the intention of the legislature in imposing the penalties and the increases is expressed in clear and unequivocal terms in sections 91 and 113(2) of the Income Tax Ordinance and, if applicable, sections 112 and 103(4) of the Income Tax Act, 1967 and having regard to the provisions in the Ordinance and in the Act the distinction between a penalty and a tax has been obliterated and the imposition of the penalty and the increase may therefore be proceeded with despite the appeal to the Privy Council;

(6) on a proper interpretation of the relevant provisions of the Income Tax Ordinance, 1947 and the Income Tax Act, 1967 the penalties and increases objected to, may be validly imposed by the Director-General and recoverable even before the final determination of the taxpayer's liability by the Privy Council, as the court of last resort, and therefore the writ clearly disclosed no reasonable cause of action and must be struck out;

(7) the taxpayer in this case should have been allowed a deduction in respect of losses incurred by his adventure in newspaper publishing in Singapore under the provisions of the Double Taxation (Republic of Singapore) Order, 1966.

Cases referred to:-

(1) *Price* v. *Phillips* 11 T.L.R. 86.
(2) *Hind* v. *Hartington* 6 T.L.R. 267.
(3) *In re Page* [1910] 1 Ch. 489.
(4) *Hunt* v. *Allied Bakeries Ltd.* [1956] 1 W.L.R. 1326; [1956] 3 All E.R. 513.
(5) *Bozson* v. *Altrincham U.D.C.* [1903] 1 K.B. 547.
(6) *Central Securities (Holdings) Bhd.* v. *Haron bin Mohamed Zaid* [1980] 1 M.L.J. 304.
(7) *Sri Jaya Transport Co. Ltd.* v. *Fernandez* [1970] 1 M.L.J. 87.
(8) *T.O. Thomas* v. *K.C.I. Reddy & Anor.* [1974] 2 M.L.J. 87.
(9) *Bank of America etc.* v. *Chai Yen* [1978] 2 M.L.J. 245; [1980] 1 M.L.J. 198.
(10) *Re Giles* (1890) 43 Ch. D. 391.
(11) *London Borough of Ealing* v. *Race Relations Board* [1972] 1 All E.R. 105.
(12) *Pengarah Tanah dan Galian W.P.* v. *Sri Lempah Enterprise Bhd.* [1979] 1 M.L.J. 135.
(13) *Lim Cho Hock* v. *Government of State of Perak* [1980] 2 M.L.J. 148.
(14) *Balen* v. *Inland Revenue Commissioners* [1977] 2 All E.R. 406.
(15) *Raleigh Investment Co. Ltd.* v. *Governor-General in Council* [1947] 74 I.A. 50; A.I.R. 47 P.C. 78.
(16) *C.I.T.* v. *A. Co. Ltd.* [1966] 2 M.L.J. 282.
(17) *Sun Man Tobacco Co. Ltd.* v. *Government of Malaysia* [1973] 2 M.L.J. 163.
(18) *Reg.* v. *Chertsey Justices, ex parte Franks* [1961] 2 Q.B. 152.
(19) *A.G.* v. *Till* 5 T.C. 440, 452.
(20) *Garrett* v. *Messenger* (1866-7) 2 Common Pleas Cases 583.
(21) *Tilley* v. *Federal Commissioners of Taxation* 3 A.I.T.R. 76.
(22) *Hubbuck* v. *Wilkinson* [1899] 1 Q.B. 86.
(23) *Station Hotels Bhd.* v. *Malayan Railway Administration* [1980] 1 M.L.J. 197.
(24) *Hock Heng Co. Sdn. Bhd.* v. *D.G.I.R.* [1979] 2 M.L.J. 51.
(25) *C.* v. *C.I.T.* [1967] 2 M.L.J. 137.

FEDERAL COURT.

P. Mooney (*Chandran* with him) for the appellant.

Noor Farida binte Ariffin (Senior Federal Counsel) for the respondent.

Cur. Adv. Vult.

Chang Min Tat F.J. (delivering the judgment of the Court): The taxpayer's long and somewhat involved history of tax litigation stemmed from a Revenue raid on his offices and the discovery of at least two sets of accounting books for the same transactions. Following this discovery, Revenue conducted what it described as "a back-duty investigation" and served notices of additional assessments on him. From these assessments, he appealed to the Special Commissioners who after a lengthy hearing conducted over a period of months made further increases by a Deciding Order made on September 27, 1975 (*q.v.* [1976] 4 M.L.J. 95). His appeal by way of case stated to the High Court was dismissed, [1977] 1 M.L.J. 67 as was his appeal to the Federal Court, [1977] 2 M.L.J. 63. An appeal to His Majesty the Yang di-Pertuan Agong is now awaiting the advice of their Lordships of the Privy Council.

The taxpayer had in this appeal in the High Court and the Federal Court not attempted to contend as a matter of law that neither the Director-General or the Special Commissioners had the power to make the additional assessments. Neither did he seriously argue, since he could not deny the existence of the several sets of accounts, against the finding of fraud or wilful default in his returns which removed the time-bar of twelve years in section 91(1) of the Act and in 1975, re-opened the assessments from the year 1953: section 91(3). Consequently, he could not contend that his returns were other than incorrect and that the information given by him was similarly incorrect. Nor did he challenge the additional assessments made by the Director-General and the Special Commissioners which were clearly made on the information derived from that set of his own books of accounts which, in the finding of the Special Commissioners, reflected a truer picture of the income derived by the taxpayer than the other set. What he argued at his appeal to the High Court was mainly that the hearing before the Special Commissioners had been vitiated by breaches of natural justice, but on this point, both the High Court and this court found against him.

The matter before us concerns the further steps taken by Revenue on the additional assessments raised by the Special Commissioners. Section 91(1) of the Income Tax Ordinance, 1947 (the Ordinance) which was the legislation applicable to the years of assessment (hereinafter called simply the years) previous to 1968 and section 113(2) of the Income Tax Act, 1967 (the Act), which was in force for the years from 1968, provide the Comptroller under the Ordinance

and the Director-General under the Act with powers to impose a penalty equal to the amount of tax undercharged in consequence of an incorrect return or information by a taxpayer. Such a penalty is by law recoverable as tax.

Further, section 103(4) of the Act provides that in the event of default in the payment of the tax within 30 days after the service of the notice of the additional assessments, the Director-General may impose an increase on the amount or balance of tax payable by 10% of this amount or balance. The corresponding section in the Ordinance was section 84(1)(a). The increase is also recoverable as if it were tax due and payable.

In exercise of his powers under these sections, and acting on the additional assessments made by the Special Commissioners, the Director-General imposed the penalties and levied the increases for the years 1953, 1957-1962, 1966-1972, except that for the year 1972, he did not appear to have imposed the increase. All the notices of these additional demands were issued on January 24, 1976.

A tabulation, first, of the Special Commissioners' figures in their Deciding Order (Table A) and, then, of the penalties and increases (Table B) may be of some assistance in the understanding of the arithmetics of this case.

TABLE A

	Tax revised by S.Cs.	*Tax previously assessed*	*Tax under-assessed & payable*
1953	166,068.80	5,006.00	161,062.80
1957	132,338.20	18,900.20	113,438.00
1958	100,477.40	63,386.20	37,091.20
1959	792,645.00	123,145.00	669,500.00
1960	683,655.85	68,080.60	615,575.25
1961	2,312,433.10	524,680.30	1,787,752.80
1962	1,010,921.50	—	1,010,921.50
1966	517,183.00	—	517,183.00
1967	631,126.25	—	631,126.25
1968	1,772,644.65	—	1,772,644.65
1969	399,368.35	—	399,368.35
1970	758,963.30	—	758,963.30
1971	1,106,608.95	—	1,106,608.95
1972	741,994.70	—	741,994.70

TABLE B

	Tax revised by S.Cs.	*Penalties*	*Additional tax payable*	*10% increase*
1953	166,068.80	161,062.80	263,937.60	26,393.76
1957	132,338.20	113,438.00	186,876.00	18,687.60
1958	100,477.40	36,008.00	61,493.20	6,149.32
1959	792,645.00	657,685.20	527,185.20	52,718.52
1960	683,655.85	587,236.90	842,812.15	84,281.21
1961	2,312,433.10	1,728,551.70	1,716,304.50	171,630.45
1962	1,010,921.50	979,559.10	1,089,321.75	108,932.17
1966	517,183.00	385,979.50	890,318.10	89,031.81
1967	(572,462.50			
	(58,663.75	631,126.25	1,160,542.50	116,054.25
1968	1,772,644.65	487,570.05	869,164.45	86,916.44
1969	399,368.35	170,500.00	325,327.75	32,532.77
1970	758,963.30	307,543.50	548,941.80	54,894.18
1971	1,106,608.95	264,000.00	549,255.55	54,925.55
1972	741,994.70	148,000.00	889,994.70	—

The additional tax payable in the third column of Table B is the total of the revised tax and the penalty less tax assessed as paid previously.

The taxpayer made no move to challenge the penalties and the increases imposed for incorrect returns and late payments while his appeal to the High Court and the Federal Court was being heard; for that matter, neither did Revenue take any step towards recovery. However in August 1977, after the dismissal of his appeal to this court, the taxpayer initiated this action and sought various declarations that the imposition of the penalties should not have been made since there is pending an appeal to the Privy Council and the matter is therefore said to be *sub-judice* and further it was *ultra vires* and void. He also sought other declarations that the levy of a 10% increase for late payment was *ultra vires* and void.

A further declaration was sought that Revenue was not entitled to claim the penalty in section 112 of the Act in respect of the year 1972. This penalty is treble the amount of tax assessed as payable for default in furnishing the return for any year. It was also said to be *sub-judice, ultra vires* and void. Table B, *supra*, does not indicate that a penalty under section 112 treble the tax assessed for 1972 was imposed. It shows that a penalty of $148,000 was imposed on an assessed tax of $741,994.70. But no matter, as the case under appeal must be decided by the proper interpretation of the law.

Revenue's reaction to the writ was to take out a summons-in-chambers under Order 25 rule 4 Rules of the Supreme Court, 1957 (see section 5 of the Courts of Judicature Act, 1964) and the inherent jurisdiction of the court to strike out the statement of claim and to have the action dismissed on the grounds that it disclosed no reasonable cause of action, it was frivolous and vexatious and an abuse of the process of the courts.

The summons came up for hearing on January 30, 1978 before the judge and it was adjourned into court for hearing, for the usual reasons and without the matter having first been argued in chambers. This hearing in court took place on July 5, 1978. Judgment was reserved. On November 6, 1978, a written judgment was delivered. The judge made the order sought for in the summons.

From this judgment and without further ado, the taxpayer filed his notice of appeal to this court.

A preliminary question arises at the appeal. It was not taken by Revenue, but by us. We are not certain that on the steps taken hitherto, an appeal lies.

Whether an appeal lies without leave?

We ought to say at the outset that if Mr. Mooney counsel for the taxpayer was taken by surprise, he was given ample opportunities to satisfy us. First, we advised him the day previous to the hearing that we would require to be satisfied that all proper steps had been taken to bring this appeal before us and when it appeared on the morning of the hearing that there was some misunderstanding over the exact point involved, he asked for and was given time till the after-

noon to prepare his answers. He did not ask for more time.

Our concern was with the application of section 68(2) of the Courts of Judicature Act, 1964 which reads:

"68. (2) No appeal shall lie from an interlocutory order made by a judge of the High Court in Chambers unless the judge has certified, after application, within four days after the making of the order by any party for further argument in court, that he requires no further argument, or unless leave is obtained from the Federal Court or from a judge of the High Court."

and/or with Order 54 rule 22A, Rules of the Supreme Court, 1957 which though said to be a local rule is actually an adaptation of Order 55 rule 14D of the Rules of the Supreme Court, 1883 as amended, and which is in these terms:

"22A. Any party dissatisfied with any order made by a judge in Chambers may apply, at the time the order is made, orally, or at any time within four days from the day of the order in writing to the Registrar, for the adjournment of the matter into court for further argument; and on such application, the judge may either adjourn the matter into court and hear further argument, or may certify in writing that he requires no further argument. If the judge hears further argument he may set aside the order previously made, and make such other order as he thinks fit."

Price v. *Phillips,*[1] *Hind* v. *Hartington,*[2] *In re Page*[3] and *Hunt* v. *Allied Bakeries Ltd.*[4] are all authorities which rule that an order to strike out or stay proceedings under this rule is interlocutory and no appeal lies without leave. It seems to us therefore that on these authorities section 68(2) bars the appeal since the further argument was not applied for and no certificate of the judge obtained.

Mr. Mooney however argued that the order was a final one. It was a final one because, applying the *Bozson* test as laid down in *Bozson* v. *Altrincham U.D.C.*[5] and applied by this court in a number of cases, the latest being *Central Securities (Holdings) Bhd.* v. *Haron bin Mohamed Zaid,*[6] it finally disposes of the rights of the parties.

He also relied on *Sri Jaya Transport Co. Ltd.* v. *Fernandez*[7] and *T.O. Thomas* v. *K.C.I. Reddy & Anor.*[8] The former case was concerned with an application to amend the statement of claim, the latter with an application for the production of a particular document. Applying the *Bozson* test, both were clearly interlocutory orders. In *Thomas* v. *Reddy,* this court by a majority held that since further argument was heard, nothing in section 68(2) precluded the appeal. In the *Sri Jaya* case, the issue of the judge's certificate was later than the one month after the order, and the solicitors thinking that the one month for the filing and service of the notice of appeal laid down in Rule 13 of the Federal Court (Civil Appeal) Transitional Rules, 1963, (now rule 56, Rules of the Federal Court, 1980), applied to the Federal Court for the special leave, then required by the rule, to appeal out of time. In refusing it, the Federal Court considered that the solicitors should have applied for leave under section 68(2), as against the special leave under the rules. The solicitors did not then have the benefit of a rather later decision in *Bank of America etc.* v. *Chai Yen,*[9] in which they again were at the wrong end of the stick. That case held that the time for appeal from an order in chambers ran not from the date of the decision, where an application for further argument had been made but from the date of the certificate of the judge that he did not require the further argument. With respect, both the *Sri Jaya* and the *Thomas* cases are clearly distinguishable on the facts and the application of the rules. If anything, the former is against the contention of the appellant.

If the striking out order is a final order, we still have to consider Order 54 rule 22A, which refers to any order made in chambers. The question then is whether a final order made in chambers is appealable without the further argument or the certificate, laid down in the rule, since the previous rule, rule 22, provides that where the judge in chambers directs that a chamber application be heard in court, his decision in the matter shall be deemed to be a decision in chambers.

In our considered view and with respect, the "any order" in rule 22A must, on a proper construction and in the absence of any words of limitation, mean and include even a final order so that if it is made in chambers, either in fact or by the deeming provisions of rule 22, no appeal lies without an application for further argument or without the judge's certificate. It may well be that having regard to the lengthy and comprehensive argument that would follow the adjournment into court, the application for further argument would not be entirely attractive, but nevertheless opportunity must be given to the judge to consider whether he would require it, as an opportunity to rehear it, *Re Giles,*[10] or to refuse it by his certificate if he should be of the opinion that no further argument would be likely to cause him to change his mind. An unsuccessful litigant before a judge in chambers has therefore two alternatives — (1) to have the matter adjourned into court or (2) failing that to apply for the judge's certificate. Further, section 4 of the Rule Committee Ordinance, 1955 under which the Rules of the Supreme Court, 1957 were made provided that the Rule Committee might make rules, *inter alia,* (a) for regulating and prescribing the procedure in proceedings by way of appeal from any court or persons to the Federal Court, compare section 16(a) and (b) of the Courts of Judicature Act, 1964. Section 17(6)(b) of the Act also provides that all rules of court before 1964 are to remain in full force and effect, until revoked, while section 67(1) enacts that the Federal Court's jurisdiction to hear appeals is subject, *inter alia,* to any written law regulating the terms and conditions upon which the appeals are brought.

In any event, however final an order may be that is made in chambers, we do not understand how it can be final until and unless one or the other of the steps required in rule 22A has been taken. Until then, it must remain in effect and for all practical purposes an interlocutory order and therefore caught by section 68(2).

We are therefore of the opinion that no appeal lies.

However, Mr. Mooney accepted the suggestion which we made (it was the same suggestion made in the *Sri Jaya* case) to apply for the leave of this court. Without making too fine a point that the leave should have first been obtained from the High Court, we

granted him leave and we proceeded to hear the appeal on the merits.

Cause of action

The first contention made by Mr. Mooney is that the taxpayer could come before the court on an action for declarations. He cited *London Borough of Ealing* v. *Race Relations Board,*[11] for the proposition that the court had jurisdiction to grant a declaration, unless clear words exist in any Act of Parliament ousting the jurisdiction of the court in the matter. We entirely agree with this "fundamental rule." This court has on its own part, in at least one case, *Pengarah Tanah dan Galian, W.P.* v. *Sri Lempah Enterprise Sdn. Bhd.*[12] granted declarations against the Government on an interpretation of statutory provisions. In the High Court in the case of *Lim Cho Hock* v. *Government of the State of Perak & Ors.,*[13] Abdoolcader J. has stressed the availability of declaratory judgments but he refused the declaration sought on the application of the provisions in the relevant legislation. *Balen* v. *Inland Revenue Commissioners*[14] clearly establishes that the High Court has jurisdiction to entertain claims for declarations where a question is raised on the application of the statutory provisions, especially so where no other appeal procedure has been laid down. The question however is not with the form but with the substance of the action, in other words, whether the application of the provisions for the tax penalties and the increases in certain circumstances and at rates set by statute is challengeable by declarations.

In *Raleigh Investment Co. Ltd.* v. *Governor-General in Council,*[15] a taxpayer also sought declarations of statutory invalidity. Under the Indian Income Tax Act (XI of 1922) section 67 provided that no suit should be brought in any civil court to set aside or modify any assessment made under the Act and the decision of the Privy Council necessarily turned on the application of this section. Our tax statutes have no similar provision, but the question is over the assessment made under the Act and it therefore seems to us that the emphasis of the Privy Council decision on the availability of effective and appropriate machinery in the Indian Act for the review of any assessment on grounds of law including the question whether any provision was *ultra vires* renders the decision of appropriate application to our tax laws which have a similar and just as effective and appropriate machinery for review. Just as their Lordships did, we must not allow our vision to be obscured by "the cloud of words" and fail to see that the relief claimed in this action, more clearly than in the Indian action, is, in substance, for the modification, if not, the cancellation of the assessment made under the Ordinance and the Act.

"An assessment made under the machinery provided by the Act, if based on a provision subsequently held to be *ultra vires*, is not a nullity like an order of a court lacking jurisdiction, but a mistake of law made in the course of its exercise."

per Lord Uthwatt, at page 62.

Further, at page 64, Lord Uthwatt in referring to the phrase "made under the Act" said that it

"describes the provenance of the assessment: it does not relate to its accuracy in point of law. The use of the machinery provided by the Act, not the result of that use, is the test."

Under section 82 of the Ordinance and section 103 of the Act, the time for the payment of the tax assessed is within one month after service of the notice of assessment. Section 103 of the Act speaks additionally of composite assessments. Further both the penalties under section 91 or section 103 respectively and the increases under section 103(4), as has been earlier observed, are recoverable as if they are tax due and payable under the legislation.

Section 103(1) provides that tax payable under an assessment or a composite assessment shall be payable within the time specified in the notice, whether or not that person appeals against the assessment or the composite assessment. Subsection (2) makes a similar provision with regard to an increased assessment made on appeal to the Special Commissioners. The tax legislation clearly intends that the tax as assessed should first be paid and therefore makes provisions that such part of the tax paid as shall be determined at the final "accounting" to be not due and payable shall be refunded. This provision of "pay first and talk afterwards" may be arguably a harsh one but it is an intentional provision of the legislature, having regard to the incidence of tax evasion. What sympathy there is must be reserved for the innocent who are made to suffer along with the tax-evaders: see also *C.I.T.* v. *A. Co. Ltd.*[16] per Choor Singh J. at page 384, cited with approval by Gill F.J. (as he then was), in *Sun Man Tobacco Co. Ltd.* v. *Government of Malaysia.*[17]

Mr. Mooney took the point that the 10% increase was a penalty and that this penalty as well as the penalties under section 91 of the Ordinance and sections 112 and 113 of the Act were not tax and not recoverable, pending the final determination of the appeal now in the Privy Council. Penal provisions are to be strictly construed and should not be given a wider interpretation than the provisions clearly provide, *Reg.* v. *Chertsey Justices, ex parte Franks*[18] at page 161; unless penalties are imposed in clear terms, they are not enforceable, or where various interpretations of a section are possible, it is a strong reason against adopting a particular interpretation if it shall appear that the result would be unreasonable or oppressive, *A.G.* v. *Till*[19] and if the legislature had intended that there should be more than one penalty that intention would no doubt have been expressed in clear and unequivocal terms, *Garrett* v. *Messenger*[20] *per* Bovill C.J. at page 585. All these cases were relied upon by Mr. Mooney, the last for the proposition that there should not be a penalty on a penalty.

In our view and with respect, the "penalty", as Mr. Mooney would have it, for incorrect return or information may be a different penalty from that for failure to pay the tax within the specified time, so that in effect there is more than one penalty, but the intention of the legislature in imposing these the penalty and the increase is expressed in what must be regarded as clear and unequivocal terms in section 91 of the Ordinance and section 113(2) and if applicable, section 112 of the Act and in section 103(4) of the Act.

There are not various interpretations of the sections, as they refer to distinct acts of commission or omission by the taxpayer required of him to do or not to do.

Mr. Mooney also relied on *Tilley* v. *Federal Commissioners of Taxation*[21] for the distinction between tax and penalty, which, as we understand him, founded his argument on *sub-judice*. No penalty is payable until the tax had been finally and conclusively determined. For ourselves, we are very doubtful about the relevance of *Tilley's* case. The full report of the judgment of Starke J. does not indicate anywhere nor were we advised that there is any provision in the Income Tax Act 1936-1939 of Australia similar to ours that the penalty or the increase shall be deemed to be tax and recoverable as such. We are of the view that having regard to our provision, the distinction between a penalty and a tax has become obliterated, for all practical purposes of tax recovery and the imposition of the penalty and increase may therefore be proceeded with immediately despite the appeal to the Privy Council.

The same argument must in our respectful opinion, provide the answer also to the question whether the penalties and the increases were *intra vel ultra vires*. Article 13(1) of the Federal Constitution guarantees the right to one's property save in accordance with law. Article 96 provides as follows:

"Article 96: No tax or rate shall be levied by or for the purposes of the Federation except by or under the authority of federal law."

The Ordinance and the Act are federal laws duly passed by Parliament. In imposing the penalties and the increases, the Comptroller and the Director-General were merely exercising the powers given to them by and performing their duties under these federal laws. There is therefore in our view no question of *ultra vires*.

On the question of limitation preventing the reopening in 1974 of the years 1952 and 1957-1962, that was an issue determined against the taxpayer in the earlier proceedings before the Special Commissioners, the High Court and in the Federal Court. And if it is still before their Lordships of the Privy Council, since the appellant-taxpayer did not raise it in the lower courts, it cannot found a cause of action in these further proceedings.

Insofar as the penalties and the increases are concerned, we therefore take the view that the cause of action is one seeking to have the particular statutory provisions in the federal law relating to taxation determined by the court. Perhaps in such a circumstance, resort should have been had to Order 25 rule 2, Rules of the Supreme Court, 1957, an objection taken on the pleadings and the point set down for argument: *Hubbuck* v. *Wilkinson*.[22] But as pointed out by the Privy Council in *Station Hotels Bhd.* v. *Malayan Railway Administration*,[23] that requires the consent of the other party. Where the case is beyond doubt, the powers conferred by rule 4 can then be exercised. The concern that matters is whether a full argument was available. In our view and with respect, this is such a case. A full argument was heard both in the High Court and as full an argument as counsel for the taxpayer could desire was available and we have come to the conclusion that on a proper interpretation of the relevant provisions of the Income Tax Ordinance, 1947 and the Income Tax Act, 1967 the penalties and the increases now objected to, may be validly imposed by the Director-General and recoverable even before the final determination of the taxpayer's tax liability by the Privy Council, as the court of last resort and that therefore the writ clearly discloses no reasonable cause of action and must be struck out as disclosing no cause of action, either under Order 25 rule 4 or under the inherent jurisdiction of the court.

But we cannot end without adverting to one area of the taxpayer's liability which the Privy Council had in another judgment indicated, should be reduced. It concerned his claim for deduction in respect of the losses incurred by his adventure in newspaper publishing in Singapore, under the provisions of the Double Taxation Relief (Republic of Singapore) Order, 1966. At all levels, the taxpayer's claim to be allowed to deduct these Singapore losses from his assessable income was disallowed. In *Hock Heng Co. Sdn. Bhd.* v. *D.G.I.R.*[24] the Privy Council has now ruled that such losses are deductible from a taxpayer's assessable income and it must be expected that in the appellant's appeal to the Privy Council, this claim in respect of his Singapore losses would be allowed and his tax liability *pro tanto* reduced. It follows that the penalty or penalties and the increase or increases in respect of that year or those years in which the losses were incurred would be to that extent reduced. A decision of any court of competent jurisdiction is binding on Revenue as on any subject of the land. The principle of *stare decisis* in turn means that the decision of the Privy Council in *Hock Heng Co. Sdn. Bhd.* v. *D.G.I.R., supra*, is binding also on all the courts of the land. One would have therefore expected Revenue to take action immediately on the pronouncement of the Privy Council judgment either to remit that part of the tax collected which did not make the necessary allowances for the Singapore losses or to indicate to the taxpayer or to the High Court and to us in respect of the claim for penalties and increases that it would make the necessary adjustment and remission. Whether or not such a remission or such an advice was made to the taxpayer we are not advised but neither the High Court nor we are told of such a remission or any intention of doing so. If this failure to take the necessary action is any indication that Revenue refuses to be bound by the Privy Council decision, then it is plainly wrong and it is open to an action for a declaration in terms, see the *Sri Lempah* case, or for an order of prohibition if it purports to collect this tax or the penalty or penalties and increase or increases, or for an order of *mandamus*, see *C.* v. *C.I.T.*,[25] a decision of the then Federal Court of Singapore with which we respectfully agree, if it had collected the tax and refused to repay unless for the purpose of a set-off against the other tax liabilities of the taxpayer.

But the action under consideration is not such an action. The appeal must be dismissed with costs.

Appeal dismissed.

Solicitors: *Skrine & Co.*